legal and equitable fees have always been limited to the period of coverture.[27] Logically, and on these analogies, the same limiting period should exist for spendthrift trusts on equitable fees. If this is the result, at most the effect is to extend the operation of the restraint twenty-one years. If the interest is future, a difficult question arises as to when the period should begin to run.[28]

The instant case seems to apply the better rule; but if a definite limit is set to the period of restraint, it is difficult to see much difference between permitting a spendthrift trust on a life estate or on a fee.[29]

### JUDICIAL DISCRETION AND RULES OF COURT

In an endeavor to banish forever the rigor and technicalities of the common-law regulations of pleading and practice, the State of New York adopted in 1848 the Field Code, a brief set of rules comprising less than four hundred sections, which were intended to cover every phase of court business. Failing to attain this necessarily impossible object, the original code was amended by successive legislatures until its size increased ten-fold, and its difficulties correspondingly. Many other states followed New York's lead, using the Field Code as a basis upon which to model their own, and with similar unsatisfactory results.

Coincident with the failure of the code system, legal societies and writers, recognizing the need for a system that would provide a just and speedy decision upon the merits with procedure playing a minor role, have been advocating the freedom of the court from legislative interference;[1] the simplest plan being that of the American Bar Association, which provides for revesting the control of procedure in the courts, the control to be exercised, however, by rules formally promulgated rather than by regulations evolved through judicial decision. Some states have already adopted such a system,[2] and it is probably only a question of time before many more will follow.

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person, fails as between a stranger and the trustee. But if termination of the trust is permitted, then the *cestui* can easily avoid the postponement by assigning his interest to a third person. At least one case seemed to recognize the power of the *cestui* to transfer the interest, and yet upheld a postponement clause of ten years against the assignee. *De Ladson v. Crawford, supra* note 24. The *cestui's* interest however does not pass to an assignee in bankruptcy. *Boston Safe Deposit Co. v. Collier, supra* note 20; see (1916) 29 HARV. L. REV. 557; L. R. A. 1917, A, 989, note.

[27] See Gray, *Restraints on Alienation,* secs. 125, 140.

[28] See Gray, *Rule Against Perpetuities,* sec. 442.

[29] See *Hopkinson v. Swaim, supra* note 20.

[1] E. M. Morgan, *Judicial Regulation of Court Procedure* (1918) 2 MINN. L. REV. 81, and articles there cited; see also Elihu Root, *Hampering the Court by Legislation* (1919) 5 A. B. A. JOUR. 676.

[2] Among these states are New Jersey (Acts, 1912, ch. 231, sec. 32); Colorado (Laws, 1913, ch. 121); Alabama (Laws, 1915, p. 607); Michigan (Pub. Acts,

The two great and obvious benefits that can be expected from the adoption of the American Bar Association's proposals are: first, that better rules will result; and, second, that the system will be less rigid and more adaptable to the varying requirements of justice. The latter object is the more difficult of attainment; and in this connection it is well to consider what has been in the past the attitude of the courts toward their own rules.

Whether a court may use its discretion in the application of its rules is a question not free from conflicting opinion. It is said that the conflict is more apparent than real, and that the answer actually depends upon whether the particular rule is *mandatory* or *directory*.[3] In order to determine which it is, we are told that the rule should be construed in the same manner as a statute is construed. It should receive a rational, sensible interpretation, one which tends to avoid the mischief at which it was leveled.[4] The application of this criterion, in its most liberal sense, should result in a reasonably flexible procedure. But other courts are inclined to be governed by words rather than by spirit, and to hold that a rule must be strictly enforced if its wording is absolute, explicit, and peremptory.[5]

Some limitation upon judicial discretion, especially in the lower courts, may be advisable for practical reasons. There should be much less room for the exercise of judicial discretion in applying a rule that is necessary to secure a fair hearing[6] than in the case of one intended solely for the convenient regulation of court business.[7] The dividing line, however, is a tenuous one, and decisions which it is hard to reconcile on principle fall on either side of it.[8] In some jurisdictions, the discretionary power is wholly denied except in those cases where non-compliance with a rule was due to mistake or accident.[9] In certain cases, it is clear that there should be no discretion whatsoever, namely, where the rules are designed to promote a public policy, e. g., to prevent collusion in divorce cases,[10] or to insure the proper qualification of candidates for admission to the bar.[11]

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1915, no. 314, sec. 14; Judicature Act, 1915, p. 5); Vermont (Laws, 1915, no. 90, sec. 10); and Virginia (Acts, 1916, p. 939).

[3] 15 C. J. 911; 18 Enc. Pl. & Pr. 1267.

[4] *Carlile v. National Oil Co.* (1921, Okla.) 201 Pac. 377, 391.

[5] *Witzler v. Collins* (1879) 70 Me. 290.

[6] *Axtell v. Pulsifer* (1895) 155 Ill. 141, 39 N. E. 615; *Holbert v. Patrick* (1918, Okla.) 176 Pac. 903.

[7] *O'Gara v. Hancock* (1918) 76 Fla. 1, 79 So. 167; *Wilson v. Peacock* (1916) 111 Miss. 116, 71 So. 296; *Connell v. Higgins* (1915) 170 Calif. 541, 150 Pac. 769; *Sanborn v. Boston & M. Ry.* (1911) 76 N. H. 65, 79 Atl. 642; *Sylvester v. Olson* (1911) 63 Wash. 285, 115 Pac. 175.

[8] *Rio Grande Irrigation Co. v. Gildersleeve* (1899) 174 U. S. 603, 19 Sup. Ct. 761; *United States v. Breitling* (1857, U. S.) 20 How. 252.

[9] *Chicago, etc. Ry. v. Priddy* (1915, Ind. App.) 108 N. E. 238.

[10] *Boyer v. Boyer* (1908) 129 App. Div. 647, 114 N. Y. Supp. 15.

[11] *In re Moore* (1888) 108 N. Y. 280, 15 N. E. 369.

Rules promulgated by a superior court under statutory authority for the guidance of lower courts are generally held to have the force and effect of statutes and to require strict observance.[12] This is necessary for proper discipline and for uniformity. It is a simple matter to amend such rules if they are found to operate harshly.

Whatever the character of the rule, it should certainly be open to the parties to agree, with the consent of the court[13] of course, to waive its requirements in order that the merits of the cause may be more rapidly and conveniently adjudicated.[14] There is no one to complain of the non-observance. However, the recent case of *Presho State Bank v. Northwestern Milling Co.* (1922, S. D.) 186 N. W. 560, involving rules adopted by the Supreme Court under statutory authority[15] for the guidance of lower courts, holds otherwise, giving the questionable reason that it might prove embarrassing to an attorney who did not wish to consent to a suspension desired by the court.

Court rules are merely a means to an end, and not an end in themselves.[16] This decision illustrates how important it is that this be kept in mind when the rules are framed. For if they do not permit a discretionary enforcement in all proper cases, they will prove, even under the proposed new system, too rigid to accomplish, in whole, the objects desired.

### PRIVILEGED DEFAMATION

When the newspapers attempted to aid the Government in arresting war slackers, by publishing lists of names supplied by the War Department, the probability of their action raising an entirely new phase of the law of privileged defamation was perhaps never considered. The "official" character of all news in war time so colored our concept of private rights that to balance them with the obvious necessity of victory was little considered. The New York World, at the request of the War Department, published the name of a supposed slacker. In an action for libel on the falsity of the statement, the defendant demurred to his complaint upon the theory that the publication was absolutely privileged. The court overruled the demurrer, holding that whatever might be the privileges of the War Department, such privilege did not extend to the defendant newspaper. *Hyman v. Press Pub. Co.* (1922) 199 App. Div. 609, 192 N. Y. Supp. 47.

The first question is that of absolute privilege. In the past it has been narrowly restricted, and has included only the proceedings of leg-

[12] *Freeling v. Kight* (1915) 49 Okla. 202, 152 Pac. 362; *Chester Traction Co. v. Philadelphia, etc. Ry.* (1897) 180 Pa. 432, 36 Atl. 916.

[13] *Missouri, etc. Ry. v. Kidd* (1906, C. C. A. 8th) 146 Fed. 499.

[14] *Allen v. Mayor of New York* (1880, S. D. N. Y.) 7 Fed. 483; *Dwinell v. Larrabee* (1853) 38 Me. 464.

[15] S. D. Rev. Code, 1919, sec. 5134.

[16] *Magill's Appeal* (1868) 59 Pa. 430.